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December 19, 2003

VIA ELECTRONIC SUBMISSION

Mr. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW – Lobby Level  
Washington, D.C. 20036

Re: **Notice of Ex Parte**  
**WC Docket No. 02-361**

Dear Ms. Dortch:

Yesterday SBC and AT&T participated in a joint ex parte meeting in the above-referenced matter. Jack Zinman, Michael Kellogg of Kellogg, Huber, Hansen, Todd Evans, and I represented SBC. David Lawson of Sidley & Austin, and Bob Quinn represented AT&T. Jon Rogovin, Jeffrey Dygert, Jon Stanley, Paula Silberthau, Deborah Weiner, Christopher Libertelli, Matt Brill, Jeff Carlisle, and Jennifer McKey represented the Commission at the meeting.

During the course of the meeting, SBC reiterated the points it has made in its earlier filings and ex partes with respect to this matter. In particular, SBC argued that the Commission did not in its 1998 *Report to Congress* alter its access charge regime and create a new exemption for all IP traffic. AT&T's argument to the contrary is frivolous. It is based entirely on a single sentence in the *Report*, which even standing on its own, cannot fairly be read to create a new exemption, but which when read in context, is even less susceptible to such a reading.

We further noted that, even if the Commission had intended to alter its access charge regime in the *Report to Congress*, it *could not* have done so because: (1) the Public Notice that preceded the *Report to Congress* made no reference to the access charge regime, but rather sought comment only on the Commission's implementation of the universal service provisions of the Act; (2) there was no ordering clause in the *Report to Congress*; and (3) a summary of the *Report to Congress* was not published in the Federal Register. Of course, the fact that the Commission made no mention of its access charge regime in the Public Notice, included no ordering clause in the *Report* itself and saw no need to publish a summary of the *Report* in the Federal Register only underscores that *the Commission obviously did not think it was creating new law in that Report*.

Because AT&T conceded that the traffic at issue is telecommunications service traffic that, absent a waiver or exemption, is subject to section 69.5 of the Commission's rules, and because the waiver or exemption that AT&T invents does not, in fact, exist, AT&T is violating section 69.5 by not paying access charges on this traffic.

SBC also argued that clear D.C. Circuit precedent establishes that it would be an abuse of discretion by the Commission to so hold on a prospective-only basis. Case law makes clear that when the Commission applies an existing rule, even to a new set of circumstances, or resolves an ambiguity in that rule, there is a strong presumption in favor of retroactive application. That presumption can only be overcome if retroactive application would produce "manifest injustice."

Courts generally have addressed the manifest injustice standard in circumstances where the agency misapplies an existing rule and then subsequently corrects its error. That was the case, for example, in *Verizon v. FCC*, 269 F.3d 1098 (D.C. Cir. 2001) and *Exxon v. FERC*, 182 F.3d 30 (D.C. Cir. 1999). In these circumstances, courts look to whether a party reasonably relied on the erroneous decision, and "there is a strong equitable presumption in favor of retroactivity that would make the parties whole." *Verizon* at 1111 citing *Exxon* at 49. AT&T has not shown that it prejudiced itself through reliance on the *Universal Service Report*, much less that any such reliance could, as a matter of law, be deemed reasonable. Nor, obviously, would anything other than retroactive application of the Commission's decision make the parties whole.

During the meeting, AT&T claimed that it accelerated deployment of its IP network because of its understanding that the *Universal Service Report* exempted it from having to pay access charges on any traffic using that network. This claim is, not only completely unsupported, but highly dubious. In fact, SBC pointed out in the meeting that it is contradicted by AT&T's public statements. For example, AT&T announced just last week that "IP technology and networking not only saves money and increases productivity, it is becoming a critical strategic tool for companies." ("AT&T Unveils Major Voice over Internet Initiative: Will Expand Business and Launch Consumer Offers in 2004" AT&T Press Release, Dec. 11, 2003).

Even if AT&T had, in fact, detrimentally relied on its erroneous reading of the *Universal Service Report*, that reliance would have been, *as a matter of law*, unreasonable under the manifest injustice test. In *Verizon and Exxon*, the D.C. Circuit held that reliance, even on a clear FCC decision, would not be reasonable if that decision were subject to appeal. In this case, AT&T purports to rely -- not on an FCC decision -- but on an erroneous claim that there was such a decision. Surely if parties may not rely, for purposes of the manifest injustice test, on an *actual agency decision* simply because that decision has been appealed, they may not reasonably rely on a mistaken belief that there ever was such a decision.

It also is self evident that the parties could not be made whole unless the Commission permits LECs to seek damages against interexchange carriers that violated the Commission's rules by not paying access charges for telecommunications services traffic. AT&T's claim that

LECs were not uncompensated because they received reciprocal compensation payments is entirely beside the point. LECs cannot be made "whole" unless they receive the access charges to which they are due under the Commission's and their applicable tariffs.

During the course of the meeting, AT&T claimed that the FCC has discretion: (1) not to apply its rules if application of those rules would make no sense; and (2) to issue a prospective-only holding. AT&T cited *Securities Exchange Commission v. Chenery Corp*, 332 U.S. 194 (1947) and *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), and certain progeny which, it said, it would identify in a forthcoming filing. SBC anticipates that it will respond to this filing when it is made. For present purposes, however, neither *SEC v. Chenery* nor *WAIT Radio* has anything to do with this case. *SEC v. Chenery* simply held that when an agency makes new law through *ad hoc* adjudication, rather than a rule of general applicability, it must balance the benefits of retroactive application "against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." 332 U.S. at 203. But this is not a case where the Commission announced new law, not covered by any general rule, in an adjudication. This is a situation in which there is a general rule that applies and the Commission is simply being called upon to enforce it. Likewise, *WAIT Radio* held only that the FCC has the authority to waive its rules. That, of course, is indisputable, but, contrary to AT&T's claim, the FCC did not waive any rules in the *Universal Service Report*, so *WAIT Radio* is irrelevant.

The bottom line is that AT&T has audaciously flouted the Commission's access charge rules. Even if AT&T had simply misread those rules, AT&T would not be entitled to benefit from its error. LECs, such as SBC, have continued to provide services to AT&T, based on our understanding that, we are entitled to be paid the tariffed charges for our services and that ultimately we would be paid. It would be manifestly unjust to reward AT&T for being wrong about the rules and to punish the LECs for being right.

Pursuant to 1.1206(a)(i) of the Commission's Rules, this letter is being filed electronically with your office.

Sincerely,

/s/ Gary L. Phillips

cc: John Rogovin (via e-mail)  
Jeffrey Dygert (via e-mail)  
John P. Stanley (via e-mail)  
Paula Silberthau (via e-mail)  
Debra Weiner (via e-mail)  
Christopher Libertelli (via e-mail)

Matthew Brill (via e-mail)  
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